IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

1. STATE OF OKLAHOMA, ex rel. W.A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA and OKLAHOMA SECRETARY OF THE ENVIRONMENT C. MILES TOLBERT, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA,	)	
Plaintiff,	)	
v.	)	Case No. 4:05-cv-00329-JOE-SAJ
1. TYSON FOODS, INC., 2. TYSON POULTRY, INC., 3. TYSON CHICKEN, INC., 4. COBB-VANTRESS, INC., 5. AVIAGEN, INC., 6. CAL-MAINE FOODS, INC., 7. CAL-MAINE FARMS, INC., 8. CARGILL, INC., 9. CARGILL TURKEY PRODUCTION, LLC, 10. GEORGE'S, INC., 11. GEORGE'S FARMS, INC., 12. PETERSON FARMS, INC., 13. SIMMONS FOODS, INC., and 14. WILLOW BROOK FOODS, INC.,	)	
Defendants.	)	

PLAINTIFF'S RESPONSE IN OPPOSITION TO "COBB-VANTRESS, INC.'S MOTION TO DISMISS COUNTS FOUR, SIX, SEVEN, EIGHT, NINE AND TEN OF THE FIRST AMENDED COMPLAINT OR, ALTERNATIVELY, TO STAY THE ACTION"

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COMES NOW Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA ("the State"), by and through counsel, and respectfully submits that Defendant Cobb-Vantress, Inc.'s Motion to Dismiss Counts Four, Six, Seven, Eight, Nine and Ten of the First Amended Complaint or, Alternatively, to Stay the Action ("Cobb-Vantress Motion") is not well-taken and should be denied.[1]

I. Introduction

The State has brought suit against the Poultry Integrator Defendants, including Defendant Cobb-Vantress, Inc. ("Defendant Cobb-Vantress"), to hold them accountable for the past and continuing injury and damage to those portions of the Illinois River Watershed ("IRW") located in Oklahoma caused by the improper storage, handling and disposal of poultry waste at poultry operations for which they are legally responsible. This improper storage, handling and disposal of poultry waste has occurred, and continues to occur, both in Oklahoma and in Arkansas.

The State's First Amended Complaint ("FAC") describes in great detail the Illinois River Watershed, *see* FAC, ¶¶ 22-31, the Poultry Integrator Defendants' domination and control of the actions and activities of their respective growers, *see* FAC, ¶¶ 32-45, the Poultry Integrator Defendants' poultry waste generation, *see* FAC, ¶¶ 46-47, the Poultry Integrator Defendants' improper poultry waste disposal practices and their impact, *see* FAC, ¶¶ 48-64, and the reason for this lawsuit, *see* FAC, ¶¶ 65-69.

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[1] This Memorandum in Opposition is intended to respond not only to the Cobb-Vantress Motion, but also to all of the other Poultry Integrator Defendants which have joined and / or adopted the Cobb-Vantress Motion.

The basis of the Poultry Integrator Defendants' legal liability is set forth in the State's 10-count FAC. Count 1 asserts a cost recovery claim under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). *See* FAC, ¶¶ 70-77. Count 2 asserts a natural resource damages claim under CERCLA. *See* FAC, ¶¶ 78-89. Count 3 asserts a citizen suit claim under the Solid Waste Disposal Act. *See* FAC, ¶¶ 90-97. Count 4 alleges that the Poultry Integrator Defendants' conduct constitutes a private and public nuisance under applicable state law. *See* FAC, ¶¶ 98-108. Count 5 alleges that the Poultry Integrator Defendants' conduct constitutes a nuisance under applicable federal law. *See* FAC, ¶¶ 109-18. Count 6 alleges that the Poultry Integrator Defendants' conduct constitutes a trespass under applicable state law. *See* FAC, ¶¶ 119-27. Count 7 alleges that the Poultry Integrator Defendants, by and through their wrongful poultry waste disposal practices, have caused pollution of the land and waters within the IRW in Oklahoma in violation of 27A Okla. Stat. § 2-6-105 and 2 Okla. Stat. § 2-18.1. *See* FAC, ¶¶ 128-32. Count 8 alleges that the Poultry Integrator Defendants, by and through those wrongful waste disposal practices that occurred in Oklahoma, have caused releases of poultry waste to the waters of the IRW in Oklahoma in violation of the Oklahoma Registered Poultry Feeding Operations Act and its accompanying regulations. *See* FAC, ¶¶ 133-36. Count 9 alleges that the Poultry Integrator Defendants, by and through those wrongful waste disposal practices that occurred in Oklahoma, have caused releases of poultry waste to the waters of the IRW in Oklahoma in violation of the regulations of the Oklahoma Concentrated Feeding Operation Act. *See* FAC, ¶¶ 137-39. And count 10 asserts a claim against the Poultry Integrator Defendants for unjust enrichment / restitution / disgorgement. *See* FAC, ¶¶ 140-47.

The Cobb-Vantress Motion seeks dismissal of counts 4 and 6-10 of the FAC on the grounds that (1) the state common law claims asserted in counts 4, 6 and 10 of the FAC are

allegedly precluded by Oklahoma's statutory and regulatory programs, and (2) the claims asserted in counts 7, 8 and 9 of the FAC are precluded by the State's alleged failure to exhaust administrative remedies. The Cobb-Vantress Motion also seeks the alternative relief of a stay of the proceedings on the ground that the doctrine of primary jurisdiction allegedly requires the State's claims be referred to the Oklahoma Department of Agriculture, Food and Forestry ("ODAFF") and the Arkansas Soil and Water Conservation Commission ("ASWCC").

The Cobb-Vantress Motion should be denied because (1) no provision of Oklahoma law preempts any other statutory pollution remedy or supplants any common law pollution remedy, (2) the State has complete legal authority to bring this action directly in this Court, without any requirement to exhaust any administrative remedies, and (3) no provision of Oklahoma law requires this Court to defer to any regulatory body under the doctrine of primary jurisdiction. Defendant Cobb-Vantress's boilerplate assertions to the contrary simply fail to properly understand the law, which provides for a multi-faceted, non-exclusive and concurrent approach to control of water pollution.

II. Legal Standards

A. Legal standard pertaining to Fed. R. Civ. P. 12(b)(6) motions

The standard for analyzing a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) is well established:

> [A]ll well-pleaded factual allegations in the amended complaint are accepted as true and viewed in the light most favorable to the nonmoving party. A 12(b)(6) motion should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted.

Sutton v. Utah State School for Deaf and Blind, 173 F.3d 1226, 1236 (10th Cir. 1999) (citations and quotations omitted).

"[T]he Federal Rules of Civil Procedure erect a powerful presumption against rejecting pleadings for failure to state a claim. Granting defendant's motion to dismiss is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." *Cottrell, Ltd. v. Biotrol International, Inc.*, 191 F.3d 1248, 1251 (10th Cir. 1999) (citations and quotations omitted). "The threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is exceedingly low." *Robey v. Shapiro, Marianos & Cejda, LLC*, 340 F.Supp.2d 1062, 1064 (N.D. Okla. 2004) (citation and quotations omitted). "A motion to dismiss for failure to state a claim is viewed with disfavor, and is rarely granted." *Lone Star Industries, Inc. v. Horman Family Trust*, 960 F.2d 917 (10th Cir. 1992) (citation and quotations omitted).

III. Argument

A. The State's common-law claims are not precluded by Oklahoma's statutory and regulatory program

Defendant Cobb-Vantress argues that the State's common law claims have been precluded by Oklahoma's statutory and regulatory program in that Oklahoma law permits land application of poultry waste. Cobb-Vantress Motion, pp. 3-5. In making its argument, Defendant Cobb-Vantress simply ignores the fact that while Oklahoma law may under certain circumstances permit the land application of poultry waste, such land application must occur consistent with certain statutes and regulations and in a manner such that, without limitation, there is no run-off and no adverse environmental impact. *See, e.g.*, 2 Okla. Stat. § 10-9.7(B)(1) ("There shall be no discharge of poultry waste to waters of the state"); 2 Okla. Stat. §10-9.7(B)(4) ("Poultry waste handling, treatment, management and removal shall: (a) not create an

environmental or public health hazard, (b) not result in the contamination of waters of the state . . ."); 2 Okla. Stat. § 20-10(B)(4) ("Animal waste handling, treatment, management and removal shall: (a) not create an environmental or public health hazard"); Okla. Admin. Code, § 35:17-3-14(b)(3)(A) ("Runoff from animal waste is prohibited where it results in a discharge to surface or groundwaters of the State"); Okla. Admin. Code, § 35:17-5-5(c) ("Storage and land application of poultry waste shall not cause a discharge or runoff of significant pollutants to waters of the State or cause a water quality violation to waters of the State"). Thus, plainly nothing in the statutory and regulatory scheme pertaining to poultry waste authorizes Defendant Cobb-Vantress's improper poultry waste disposal practices – practices which are alleged in the FAC to have caused run-off of poultry waste into Oklahoma's waters, created an environmental and public health hazard in Oklahoma, and caused pollution of the IRW in Oklahoma. *See* FAC, ¶¶ 48-64 (describing Poultry Integrator Defendants' improper poultry waste disposal practices and their impact) & ¶¶ 43-45 (describing Poultry Integrator Defendants' domination and control of the actions and activities of their respective poultry growers). In fact, it cannot be disputed that even if they were to comply with the Oklahoma statutes and regulations concerning nutrient standards for the land application of poultry waste, the Poultry Integrator Defendants still would violate Oklahoma law if their land application causes run-off or an adverse environmental impact.

Further, and in any event, as noted by Oklahoma Supreme Court in *Sharp v. 251st Street Landfill, Inc.*, 810 P.2d 1270, 1274 fn. 4 (Okla. 1991), *overruled on other grounds*, "we have never ruled approval of an activity by an administrative agency alone is sufficient to transform what would otherwise be considered a nuisance, abatable or subject to injunction, into a legalized nuisance impervious to such forms of relief." (Emphasis in original.) *See also Briscoe v. Harper*

Oil Co., 702 P.2d 33, 37 (Okla. 1985) ("The fact that a person or corporation has authority to do certain acts does not give the right to do such acts in a way constituting an unnecessary interference with the rights of others. A license, permit or franchise to do a certain act cannot protect the licensee who abuses the privilege by erecting or maintaining a nuisance"); OUJI § 9.11 ("Compliance with requirements of the [statute / ordinance] does not excuse one from the duty to exercise ordinary care").

Underscoring the viability of the State's common law claims is the fact that it is established by statute in Oklahoma that the common law continues in force and effect in aid of Oklahoma's general statutes:

> The common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the general statutes of Oklahoma; but the rule of the common law, that statutes in derogation thereof, shall be strictly construed, shall not be applicable to any general statute of Oklahoma; but all such statutes shall be liberally construed to promote their object.

12 Okla. Stat. § 12. Thus, the common law remains in force in Oklahoma, unless a statute explicitly provides to the contrary. *Satellite Systems Inc. v. Birch Telecom of Oklahoma, Inc.*, 51 P.3d 585, 588 (Okla. 2002) (upholding common law fraud claim against affirmative defense of filed tariff doctrine). A legislative intention to abolish a common law right must be clearly and plainly expressed. *Satellite Systems,* 51 P.3d at 588. A presumption favors the preservation of common-law rights. *Satellite Systems,* 51 P.3d at 588. No constitutional or statutory law, or Oklahoma judicial decision, explicitly, clearly, and plainly rebuts the presumption in favor of preservation of common law rights or expresses a legislative intent to eliminate Oklahoma's common law remedies for pollution.

In fact, 27A Okla. Stat. § 2-6-105, which provides that pollution of any waters of the state to be a public nuisance, "simply carries the intent of Oklahoma Legislature [as voiced in 50

Okla. Stat. § 2] into effect . . . ." *N.C. Corff Partnership, Ltd. v. Oxy USA, Inc.*, 929 P.2d 288 (Okla. App. 1996), *cert. denied* (1996). And as noted in *Nichols v. Mid-Continent Pipe Line Co.*, 933 P.2d 272, 276 (Okla. 1996), "[t]he statutory definition of nuisance – in 50 O.S.1991 §§ 1 *et seq.* – encompasses the common law's private and public nuisance concepts. It abrogates neither action."

In sum, Oklahoma's common law pollution remedies remain in full force.[2]

B. The State, by and through its Attorney General, can directly enforce the Oklahoma statutes, regulations and laws at issue through a lawsuit

Defendant Cobb-Vantress contends that prior to filing a lawsuit under the Oklahoma Agricultural Code the State must first exhaust administrative remedies. Cobb-Vantress Motion, pp. 5-11. Defendant Cobb-Vantress is wrong on two accounts. First, as will be shown below on a statute-by-statute basis, the express language of the various statutes at issue provides for direct enforcement in the courts by the Attorney General. Where the plain language of a statute

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[2] Similarly, Defendant Cobb-Vantress should not be heard to argue that the statutory provisions upon which the State bases its claims are precluded by other statutory provisions. It is well-established in Oklahoma that repeal of statutes by implication is not favored and all statutory provisions must be given effect unless an irreconcilable conflict exists. *See Davis v. CMS Continental Natural Gas, Inc.*, 23 P.3d 288, 291 (Okla. 2001); *see also United States v. Borden Co.*, 60 S.Ct. 182, 188 (1939). If possible, statutes are to be construed so as to render them consistent with one another. *Sharp v. Tulsa County Election Bd.*, 890 P.2d 836, 840 (Okla. 1994). It is the duty of the Court to reconcile the different provisions of statutes, as far as practicable, to make them not only consistent and harmonious, but also to give an intelligent effect to each. *Sharp,* 890 P.2d at 840. If two constructions are possible, this Court will prefer the one that avoids conflict between the two provisions. *Sharp,* 890 P.2d at 840. No Oklahoma statute evidences an irreconcilable conflict between the agricultural and environmental regulatory schemes and the continued vitality of other statutory pollution remedies. Indeed Oklahoma's statutory pollution control schemes compliment each other. Defendant Cobb-Vantress has not, and cannot, shown a "clear and manifest" legislative intent to repeal all other existing statutory pollution remedies. Creating new laws to deal with the new realities of industrialized agriculture in no way undermines old remedies for pollution. *See, e.g.*, 27A Okla. Stat. § 2-6-105. Therefore, it is the Court's duty to give effect to all of the pertinent statutes to aid in the clean up of pollution caused by Defendant Cobb-Vantress, and the compensation of the State for that pollution.

contains no exhaustion requirement, and "where the language of a statute is plain and unambiguous, . . . the statute will be accorded the meaning as expressed by the language therein employed." *Ladd Petroleum Corp v. Oklahoma Tax Commission,* 767 P.2d 879, 882 (Okla. 1989) (direct recourse to district court allowed by statute, no need to exhaust remedies before the Tax Commission). Similarly, in the federal system exhaustion of remedies is not required under the Administrative Procedures Act when neither the relevant statute nor agency rules specifically mandate exhaustion as a prerequisite to judicial review. *Daugherty v. U.S.*, 212 F.Supp.2d 1279, 1288 (N.D. Okla. 2002), citing *Darby v. Cisneros*, 509 U.S. 136, 154, 113 S.Ct. 2539, 125 L.Ed.2d 113 (1993).

Second, the exhaustion of administrative remedies doctrine does not apply when the government, as a regulator, is the party bringing suit. *See, e.g., United States v. Tenet Healthcare Corp.*, 343 F.Supp.2d 922, 934 (C.D. Cal. 2004) (stating in Medicare overpayments recovery action that "[w]here, as here, the government itself 'decides to pursue a judicial remedy, the exhaustion of remedies doctrine is simply not applicable'") (citation omitted). Defendant Cobb-Vantress apparently confuses the role of the State as the prosecutor of violations with that of private parties subject to regulation. When the sovereign State of Oklahoma, by and through its Attorney General, elects to proceed to enforce its laws directly in court, it has the unfettered authority to do so. Simply put, there is no provision in any of the Oklahoma statutes or regulations at issue here that requires the Attorney General to prosecute his claim on behalf of the State before an administrative agency.

1. The Oklahoma Registered Poultry Feeding Operations Act, 2 Okla. Stat, § 10-9.1, *et seq.*

The Attorney General may directly bring actions in the courts to enforce the Oklahoma Registered Poultry Feeding Operations Act and rules promulgated under it. 2 Okla. Stat. § 10-9.11(A)(2) provides:

> The Attorney General or the district attorney of the appropriate district court of Oklahoma may bring an action in a court of competent jurisdiction for the prosecution of a violation by any person of a provision of the Oklahoma Registered Poultry Feeding Operations Act or any rule promulgated thereunder.

(Emphasis added.) This plain statutory language flatly contradicts Defendant Cobb-Vantress's assertion, *see* Cobb-Vantress Motion, p. 8, that (1) enforcement of the Oklahoma Registered Poultry Feeding Operations Act ("Poultry Act") has been left solely to the ODAFF (at least in the first instance), and (2) there is no direct recourse to the courts. Reinforcing the error of Defendant Cobb-Vantress's contention is the fact that 2 Okla. Stat. § 10-9.11(C)(1) plainly allows either the Attorney General, a district attorney, or the ODAFF to go directly to court for injunctive relief to redress or restrain a violation of the Poultry Act or any regulation promulgated under it:

> Any action for injunctive relief to redress or restrain a violation by any person of the Oklahoma Registered Poultry Feeding Operations Act, or for any rule promulgated thereunder, or order issued pursuant thereto, or recovery of any administrative penalty assessed pursuant to the Oklahoma Registered Poultry Feeding Operations Act may be brought by:
>
> a. the district attorney of the appropriate district court of the State of Oklahoma,
> b. the Attorney General on behalf of the State of Oklahoma, or
> c. the Department on behalf of the State of Oklahoma.

(Emphasis added).

Furthermore, it is clear that the courts have jurisdiction over such direct actions by the Attorney General:

> The court shall have jurisdiction to determine the action, and to grant the necessary or appropriate relief, including but not limited to mandatory or prohibitive injunctive relief, interim equitable relief, and punitive damages.

2 Okla. Stat. § 10-9.11(C)(2) (emphasis added). *See also* 2 Okla. Stat. § 10-9.11(B)(2) ("A district court may grant injunctive relief to prevent a violation of, or to compel compliance with, any of the provisions of the Oklahoma Registered Poultry Feeding Operations Act or any rule promulgated thereunder or order, registrations and certificates issued pursuant to the Oklahoma Registered Poultry Feeding Operations Act") (emphasis added).

Clearly, the Poultry Act's statutory scheme creates no primary jurisdiction in any of these officials, and imposes no requirement of exhaustion of administrative remedies before seeking injunctive relief. If the Attorney General, a local district attorney, or the administrative agency may seek injunctive relief, the Oklahoma Legislature must not have believed that the questions presented required the special competence of the administrative agency to handle the matter. Likewise, the Oklahoma Legislature obviously recognized that courts of general jurisdiction are competent to find the facts and craft appropriate remedies for violations of the ORPFA and that no specialized administrative expertise is needed. Simply put, the plain language of 2 Okla. Stat. § 10-9.11 allows the Attorney General to file, and this Court to hear, Count 8 of the FAC without any condition precedent.[3]

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[3] Defendant Cobb-Vantress's suggestion that completion of the administrative complaint procedure under Okla. Admin. Code § 35:17-5-9 is a condition precedent to the Attorney General filing a lawsuit is clearly erroneous in that it would impermissibly require this Court to ignore the plain and unequivocal language of 2 Okla. Stat. § 10-9.11. *See Davis,* 23 P.3d at 291. Simply because the Oklahoma Legislature allows the ODAFF to hold proceedings under the Administrative Procedure Act cannot be construed to mean that such proceedings are the exclusive, primary or even favored means of combating poultry pollution.

2. The Oklahoma Environmental Quality Code, 27A Okla. Stat. § 2-1-101, *et seq.*

The Attorney General may directly bring actions in the courts to enforce the Oklahoma Environmental Quality Code ("OEQC") and rules promulgated under it. 27A Okla. Stat. § 2-3-504(E) & (F) provides:

> The Attorney General or the district attorney of the appropriate district court of Oklahoma may bring an action in a court of competent jurisdiction for the prosecution of a violation by any person of a provision of this Code or any rule promulgated thereunder, or order, license or permit issued pursuant thereto.
> F. 1. Any action for injunctive relief to redress or restrain a violation by any person of this Code or of any rule promulgated thereunder, or order, license, or permit issued pursuant thereto or for recovery of any administrative or civil penalty assessed pursuant to this Code may be brought by:
> a. the district attorney of the appropriate district court of the State of Oklahoma,
> b. the Attorney General on behalf of the State of Oklahoma, or
> c. the Department on behalf of the State of Oklahoma.
> 2. The court shall have jurisdiction to determine said action, and to grant the necessary or appropriate relief, including but not limited to mandatory or prohibitive injunctive relief, interim equitable relief, and punitive damages.

(Emphasis added). Because he can directly bring actions to enforce the OEQC and any rule promulgated thereunder, the Attorney General has the authority to file, and this Court has the jurisdiction to hear, Counts 4 and 7 of the FAC. *See* 27A Okla. Stat. § 2-3-504. Plainly, the Oklahoma Legislature recognized that courts of general jurisdiction are competent to find the facts and craft appropriate remedies for violations of the OEQC. No specialized administrative expertise is needed.

3. The Oklahoma Concentrated Animal Feeding Operations Act, 2 Okla. Stat. § 20-1, *et seq.*

Likewise, contrary to the assertion of Defendant Cobb-Vantress, *see* Cobb-Vantress Motion, p. 11, the Attorney General may directly bring actions in the courts to enforce the

Oklahoma Concentrated Animal Feeding Operations Act ("CAFO Act") or any rule promulgated thereunder. 2 Okla. Stat. § 20-26(E) and (F) provide:

> E. The Attorney General or the district attorney of the appropriate district court of Oklahoma may bring an action in a court of competent jurisdiction for the prosecution of a violation by any person of a provision of the Oklahoma Concentrated Animal Feeding Operations Act or any rule promulgated thereunder, or order, license or permit issued pursuant thereto.
>
> F.1. Any action for injunctive relief to redress or restrain a violation by any person of the Oklahoma Concentrated Animal Feeding Operations Act or for any rule promulgated thereunder, or order, license, or permit issued pursuant thereto or recovery of any administrative or civil penalty assessed pursuant to the Oklahoma Concentrated Animal Feeding Operations Act may be brought by:
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> a. the district attorney of the appropriate district court of the State of Oklahoma,
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> b. the Attorney General on behalf of the State of Oklahoma, or
>
> c. the Department on behalf of the State of Oklahoma.
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> 2. The court shall have jurisdiction to determine said action, and to grant the necessary or appropriate relief, including but not limited to mandatory or prohibitive injunctive relief, interim equitable relief, and punitive damages.

(Emphasis added). Because he can directly bring actions to enforce the CAFO Act and any rule promulgated thereunder, the Attorney General has the authority to file, and this Court has the jurisdiction to hear, Count 9 of the FAC. *See* 2 Okla. Stat. § 20-26.[4] Plainly, the Oklahoma Legislature recognized that courts of general jurisdiction are competent to find the facts and craft appropriate remedies for violations of the CAFO Act. No specialized administrative expertise is needed.

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[4] Defendant Cobb-Vantress's suggestion that completion of the administrative complaint procedure under Okla. Admin. Code § 35:17-3-23 is a condition precedent to the Attorney General filing a lawsuit under the CAFO Act is clearly erroneous in that it would impermissibly require this Court to ignore the plain and unequivocal language of 2 Okla. Stat. § 20-26. *See Davis,* 23 P.3d at 291. Simply because the Oklahoma Legislature allows the ODAFF to hold proceedings under the Administrative Procedure Act cannot be construed to mean that such proceedings are the exclusive, primary or even favored means of combating poultry pollution.

4. The Oklahoma Agricultural Code, 2 Okla. Stat. § 2-18.1

The Attorney General may directly bring actions in the courts to enforce the Oklahoma Agricultural Code ("OAC") or any rule promulgated thereunder. 2 Okla. Stat. § 2-16(B) and (C) provide:

> B. Any action to redress or restrain a violation of the Oklahoma Agricultural Code, any promulgated rule or any order, license, charter, registration, or permit issued pursuant to the Oklahoma Agricultural Code or to recover any administrative or civil penalty or other fine assessed pursuant to the Oklahoma Agricultural Code, may be brought by:
>
> 1. The district attorney of the appropriate district court of the State of Oklahoma;
> 2. The Attorney General on behalf of the State of Oklahoma; or
> 3. The Oklahoma Department of Agriculture, Food, and Forestry on behalf of the State of Oklahoma.
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> C. The court shall have jurisdiction to determine the action, and to grant the necessary appropriate relief, including but not limited to mandatory or prohibitive injunctive relief, interim equitable relief, and punitive damages.

(Emphasis added.) Because he can directly bring actions to enforce the OAC and any rule promulgated thereunder, the Attorney General has the authority to file, and this Court has the jurisdiction to hear, Counts 4 and 7 of the FAC. *See* 2 Okla. Stat. § 2-16.[5] Plainly, the Oklahoma Legislature recognized that courts of general jurisdiction are competent to find the facts and craft appropriate remedies for violations of the OAC. No specialized administrative expertise is needed.

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[5] Defendant Cobb-Vantress's contention that 2 Okla. Stat. § 2-18 mandates the conclusion that the ODAFF has been entrusted with the responsibility for determining, at least in the first instance, whether persons have violated the OAC is clearly erroneous in that it would impermissibly require this Court to ignore the plain and unequivocal language of 2 Okla. Stat. § 2-16. *See Davis,* 23 P.3d at 291. Simply because the Oklahoma Legislature allows the ODAFF to hold proceedings under the Administrative Procedure Act cannot be construed to mean that such proceedings are the exclusive, primary or even favored means of combating pollution.

5. Civil penalties

Cobb-Vantress confuses provisions of the law for administrative, as opposed to civil, penalties. Cobb-Vantress Motion, pp. 7-11. While undoubtedly provisions of Oklahoma's statutes allow the ODAFF or the ODEQ to seek administrative penalties in administrative proceedings, the statutes also unambiguously allow the State, acting through its Attorney General, to seek civil penalties directly in court for violations of statutes and rules at issue in this case. *See* 2 Okla. Stat. § 2-16(B) (civil penalties for violations of the Agriculture Code), 2 Okla. Stat. §§ 20-26(B) & (F) (civil penalties for violations of the Concentrated Animal Feeding Operations Act), 27A Okla. Stat. §§ 2-3-504(A)(2) & (F) (civil penalties for violations of Oklahoma Environmental Quality Code). Consequently, because the law plainly allows both administrative and civil penalties for violations, the State need not exhaust any administrative remedies before seeking civil penalties in this case.

6. The Attorney General has both common law and statutory authority to bring actions when the interests of Oklahoma are implicated

Based upon the above review of each of the statutes, there can be no dispute that the Oklahoma Legislature has conferred upon the Attorney General the express statutory authority to directly bring an action in this Court without first exhausting administrative remedies. Indeed, buttressing this review, it is useful to understand the broad powers of the Attorney General to bring actions such as this on behalf of the State when the interests of Oklahoma are implicated.

Article 6, § 1(A) of the Oklahoma Constitution provides that: "[t]he Executive authority of the state shall be vested in a Governor, . . . Attorney General . . . and other officers provided by law and this Constitution, each of whom . . . shall perform such duties as may be designated in this Constitution or prescribed by law. 74 Okla. Stat. § 18 provides that: "[t]he Attorney General shall be the chief law officer of the state." *State ex rel. Derryberry v. Kerr-McGee*

Corp., 516 P.2d 813, 818 (Okla. 1973), provides that: "[i]n the absence of express statutory or constitutional restrictions, the common law duties and powers attach themselves to the office [of Attorney General] as far as they are applicable and in harmony with our system of government." (Emphasis added.) In the absence of explicit legislative or constitutional expression to the contrary, the Attorney General possesses complete dominion over every litigation in which he properly appears in the interest of the State, whether or not there is a relator or some other nominal party. *Kerr-McGee,* 516 P.2d at 818, relying upon *State ex rel. Nesbitt v. District Court of Mayes County*, 440 P.2d 700, 707 (Okla. 1967).

74 Okla. Stat. § 18b delineates the duties and powers of the Attorney General, and in pertinent part reads:

> The duties of the Attorney General as the Chief Law Officer of the state shall be . . . (3) To initiate or appear in any action in which the interests of the state or the people of the state are at issue, or to appear at the request of the Governor, the Legislature, or either branch thereof, and prosecute and defend in any court or before any commission, board or officers any cause or proceeding, civil or criminal, in which the state may be a party or interested; and when so appearing in any such cause or proceeding, the Attorney General may, if the Attorney General deems it advisable and to the best interest of the state, take and assume control of the prosecution or defense of the state's interest therein;

74 Okla. Stat. § 18b(A)(3) (emphasis added).

The State clearly has legally cognizable and protectable interests at stake here. Pursuant to 60 Okla. Stat. § 60, waters forming definite streams, be they navigable or nonnavigable, are public waters. It is public policy of the State to protect these waters from pollution. 82 Okla. Stat. § 1084.1 provides:

> Whereas the pollution of the waters of this state constitutes a menace to public health and welfare, creates public nuisances, is harmful to wildlife, fish and aquatic life, and impairs domestic, agricultural, industrial, recreational and other legitimate beneficial uses of water, it is hereby declared to be the public policy of this state to conserve and utilize the waters of the state and to protect, maintain and improve the quality thereof for public water supplies, for the propagation of

> wildlife, fish and aquatic life and for domestic, agricultural, industrial, recreational and other legitimate beneficial uses . . . .

Complementing this interest in the waters, the State "has a quasi-sovereign interest in the health and well-being -- both physical and economic -- of its residents in general." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 102 S.Ct. 3260, 3269 (1982); *see also Georgia v. Tennessee Copper Co.*, 27 S.Ct. 618, 619 (1907) ("[T]he State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain"). "[I]t is clear that a state may sue to protect its citizens against 'the pollution of the air over its territory; or of interstate waters in which the state has rights.'" *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1469 (10th Cir. 1993) (citation omitted); *see also Spiva v. State of Oklahoma*, 584 P.2d 1355, 1360 (Okla. Crim. App. 1978) ("That the State has a valid interest in matters which affect the public health, safety and general welfare is undisputed . . ."). In light of this clear mandate – a mandate that the Attorney General is charged with carrying out, *see* 74 Okla. Stat. § 18b(A)(3) – it would be wholly inconsistent to restrict the manner in which the Attorney General combats water pollution and protects the environment of the State of Oklahoma.

C. No agency has primary jurisdiction over these claims, and the Court should not defer to any nonexistent administrative proceedings

Defendant Cobb-Vantress argues that primary jurisdiction of the State's claims brought pursuant to agricultural statutes or Oklahoma common law (*i.e.*, counts 4 and 6-10) lies with the ODAFF and the ASWCC. This argument is without merit. As discussed in detail above in Section III.B., the Oklahoma State Legislature has clearly conferred enforcement rights of the

statutory claims[6] at issue upon both the ODAFF and the Attorney General. *See* 2 Okla. Stat. § 10-9.11; 27A Okla. Stat. § 2-3-504; 2 Okla. Stat. § 20-26; 2 Okla. Stat. § 2-16.

The doctrine of primary jurisdiction is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 63 (1956). The doctrine "provides that where the law vests in an administrative agency the power to decide a controversy or treat an issue, the courts will refrain from entertaining the case until the agency has fulfilled its statutory obligation." *Marshall v. El Paso Natural Gas Company*, 874 F.2d 1373, 1376-77 (10th Cir. 1989). "No fixed formula exists for applying the doctrine. . . . In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." *Western Pacific,* 352 U.S. at 64. Courts consider the following factors when determining whether the doctrine of primary jurisdiction should be applied: (1) whether the issues of fact raised in the case are not within the conventional experience of judges; (2) whether the issues of fact require the exercise of administrative discretion; and (3) whether the issues of fact require uniformity and consistency in the regulation of the business entrusted to a particular agency. *Marshall*, 874 F.2d at 1377; *U.S. v. Zweifel*, 508 F.2d 1150, 1156 (10th Cir. 1975. Further, courts also consider whether there is a

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[6] Nowhere is there any support for the proposition that the Oklahoma legislature abrogated the common law causes of action for trespass, nuisance or unjust enrichment through its enactment of the statutes at issue. *See, e.g.,* 12 Okla. Stat. § 12 ("The common law . . . shall remain in force in aid of the general statutes of Oklahoma . . . ."). Therefore, Defendant Cobb-Vantress's attempt to bootstrap the State's common law claims into its primary jurisdiction argument fails. Simply put, if the administrative agencies do not even have primary jurisdiction over the statutory violations alleged – which the State has demonstrated they do not – it is inconceivable that the administrative agencies would have primary jurisdiction over the common law claims.

contemporaneous exercise of concurrent jurisdiction between the court and the administrative agency. *Marshall,* 874 F.2d at 1379.

1. The Oklahoma Legislature has expressly provided that the Attorney General may enforce the statutes at issue through the use of the courts

The Oklahoma Legislature has created separate and distinct parallel enforcement mechanisms for those provisions of the agriculture and environmental statutes at issue in this case. As demonstrated above, enforcement actions on behalf of the State may be brought directly in court by either the Attorney General, a district attorney or the ODAFF under the same statutes and regulations giving the ODAFF administrative authority over poultry waste pollution. Thus, the Oklahoma Legislature has deliberately crafted a regime to protect the public with either immediate recourse to court for injunctive relief when needed, or more routine administrative proceedings when appropriate. *See, e.g., Meinders v. Johnson,* Okla. App., Nov. 2, 2005 Slip Opinion, p. 21 ("To read the cited sections as depriving the district court of its 'unlimited original jurisdiction of all justiciable matters' raises some substantial constitutional questions, and, absent a clearer expression of the Legislature's intent to divest the district court of its general jurisdiction, we must adopt a construction of the cited sections which frees them of constitutional infirmity"; finding Oklahoma Corporation Commission did not have exclusive jurisdiction over pollution matter). Thus, neither enforcement mechanism provided by the statutes has primary jurisdiction, and the Court need not stay this action in deference to an administrative proceeding.

2. The issues of fact raised in the case are within the conventional experience of judges

Indisputably, the factual issues in this case are well within the usual competency of courts to decide: (1) whether there has been a release of pollutants, (2) the unreasonableness of the activities of the Poultry Integrator Defendants, (3) the trespass of pollutants into Oklahoma's

waters and the interference with Oklahoma's waters caused by these pollutants, (4) the means necessary to abate nuisances or enjoin trespasses, and (5) the compensation of the State for the damages to its natural resources. These factual issues, and appropriate damages and remedies, are those historically exercised by courts in traditional nuisance, trespass and unjust enrichment actions. Courts, not administrative agencies, pioneered these causes of action. Indeed, this Court was quite recently called upon to handle a case against the poultry industry that asserted many claims similar to the ones being asserted here. *See City of Tulsa v. Tyson Foods, Inc.*, Case No. 01-CV-0900-B(C), N.D. Okla

Moreover, the statutory authority of the Attorney General to go directly to Court to enforce the agriculture and environmental statutes and rules without first exhausting any administrative remedies amounts to a clear legislative determination that these laws should be enforced in court and that courts of general jurisdiction can make the necessary factual determinations and craft appropriate remedies without the aid of any administrative agency expertise. In fact, Congress reposed confidence in federal courts to handle such issues by passing CERCLA and RCRA. Judicial economy and any concern for consistency dictate that the common law claims and the state and federal statutory claims be heard together.

In *Zweifel*, 508 F.2d 1150, the Tenth Circuit approved the United States proceeding directly to district court to invalidate contested mining claims on federal land, even though the Department of the Interior had an administrative process by which the government could have challenged the mining claims. The Tenth Circuit drew a clear distinction between the options of private claimants and the government itself. Private claimants are prohibited from seeking federal court interference with Department of the Interior proceedings to determine the validity of claims. *Zweifel*, 508 F.2d at 1155. This principle did not foreclose the government's entering

federal court to vindicate its title to public lands, nor did the statute conferring authority upon the Secretary of the Interior over the administration of public lands constitute, by their terms, an exception to federal court jurisdiction under 28 U.S.C. § 1345. *Zweifel*, 508 F.2d at 1155. The Tenth Circuit held that the United States could, at its election, proceed either in the administrative tribunal of the Department of Interior, or under 28 U.S.C. § 1345 in the district court to clear title to public lands. *Zweifel*, 508 F.2d at 1155. Considering whether the district court should have deferred to the Department of Interior, the Tenth Circuit noted that, while the Department of Interior had primary responsibility for determining mining claims, the district court correctly refused to insist on prior administrative inquiry, in part, because the case involved a factual inquiry of the type courts regularly decide because the desirability of court abstention diminishes where the court faces factual issues of the sort that it considers routinely. *Zweifel*, 508 F.2d at 1156.

3. The issues of fact in the instant action do not require the exercise of administrative discretion

District courts are not required under the doctrine of primary jurisdiction to defer factual issues to an agency under the doctrine of primary jurisdiction if those factual issues are the sort the court routinely considers. *Marshall*, 874 F.2d at 1377 (district court correctly retained case involving pollution damage from negligent plugging well). In *Marshall* the Court recognized:

> There are many cases in which the Oklahoma courts have determined the existence of water and soil pollution from oil and gas activities without referring the issue to the Commission. *See e.g., Ohio Oil Co. v. Elliott,* 254 F.2d 832 (10th Cir. 1958) (action under Oklahoma law for damages to cattle from drinking water from a stream polluted by the release of salt water); *Sunray [Mid-Continent Oil Co. v. Tisdale*, 366 P.2d 614 (Okla. 1961)] (negligent plugging of oil well polluted fresh water well); *Harper-Turner Oil* [*Co. v. Bridge*, 311 P.2d 947 (Okla. 1957)] (same); *Tenneco Oil Co. v. Allen,* 515 P.2d 1391 (Okla. 1973) (action to recover damages to land from escaping oil and salt water including cleanup costs); *Sunray DX Oil Co. v. Brown,* 477 P.2d 67 (Okla. 1970) (action to recover damages to land from leaking pipeline); *Nichols* [*v. Burk Royalty Co.,* 576 P.2d 317] (action to recover damages to land where defendant admitted injurious

> spillage). We do not find the district court abused its discretion in refusing to apply primary jurisdiction to the water and soil pollution issues.

Marshall, 874 F.2d at 1378. This action raises similar factual issues of the sort routinely considered by courts. Consequently, this Court can and should exercise jurisdiction over the State's claims of poultry waste pollution.

4. The Court is in the best position to ensure uniformity and consistency in the interpretation and enforcement of pollution control laws

Moreover, Defendant Cobb-Vantress's claims that the Court should defer to the regulatory agencies of two separate states because uniformity and consistency is needed in the regulation of the poultry industry simply makes no sense. The governments of Oklahoma and Arkansas have negotiated for years while the Poultry Integrator Defendants have continued their practices – practices which cause pollution of Oklahoma's waters. The Poultry Integrator Defendants offer no basis for the Court to conclude that the agencies of Arkansas and Oklahoma can or will jointly regulate the industry in a uniform fashion to abate the pollution and compensate the State of Oklahoma. Further, the Poultry Integrator Defendants have not argued that the regulatory agencies have subjected them to any orders whatsoever which might potentially conflict with the remedial orders which the Court should issue.

5. There is no pending administrative action regarding the pollution of the IRW

This simply is not a case in which the Court can or should defer to some hypothetical administrative proceeding. In support of its argument that application of the doctrine of primary jurisdiction is appropriate in the context of environmental claims, Defendant Cobb-Vantress cites several cases. *See* Cobb-Vantress Motion, pp. 18-19 fn. 7. In all of the cases cited by Defendant Cobb-Vantress, some action by a regulatory agency had been initiated. Neither the Oklahoma nor the Arkansas regulatory agencies are presently prosecuting any enforcement action against

any of the Poultry Integrator Defendants to correct the pollution of Oklahoma's waters which is the subject of this suit. Indeed, Defendant Cobb-Vantress states that the ODAFF has filed no complaint and initiated no investigation of it. Cobb-Vantress Motion, p. 10. Thus, there is no ongoing administrative proceeding to which the Court could defer.

Solving the pollution problem caused by the Poultry Integrator Defendants' poultry waste need not, and cannot, be left solely to regulatory agencies because they lack the means and the jurisdiction to clean up and redress the injury to the entire area at issue. By contrast, the Court can properly determine the compensatory and punitive damages to which the State is entitled, and can issue remedial orders to abate the nuisance and enjoin the trespass. Thus, the only solution to the poultry waste pollution will come from the Court, and not from any regulatory agency. Reference to any regulatory agency presents only the illusion of a remedy, not its reality.

6. Arkansas agencies do not have primary jurisdiction

For all the reasons stated above, it follows that Arkansas agencies likewise do not have any primary jurisdiction over the matters raised by this lawsuit. For instance, although the Arkansas Legislature passed legislation governing poultry operations in 2003, the deadline for obtaining even a nutrient or poultry litter management plan is not until January 1, 2007. *See* Ark. Code § 15-20-1106(f) ("Application of poultry litter to soils or associated crops within a nutrient surplus area shall be done in accordance with a nutrient management plan or poultry litter management plan after January 1, 2007"). In light of such facts, it cannot be argued that a comprehensive regulatory scheme exists in Arkansas such that an Arkansas agency has the exclusive power to decide whether pollution is occurring in Arkansas and causing injury and damage in Oklahoma.

In sum, the doctrine of primary jurisdiction is inapplicable and, as such, this action should not be stayed.

IV. Conclusion

WHEREFORE, premises considered, the Cobb-Vantress Motion should be denied.

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CERTIFICATE OF SERVICE

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